No. 80251-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

VERNON BRAATEN,
Plaintiff/Appellant/Respondent on Review,

v.

BUFFALO PUMPS, INC., et al.,
Defendants/Respondents/Petitioners on Review,

ON REVIEW FROM THE COURT OF APPEALS, DIVISION I

SUPPLEMENTAL BRIEF OF PETITIONER CRANE CO.

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A. INTRODUCTION

As the submissions already before the Court show, the Court of Appeals' decisions here, 137 Wn. App. 32, 151 P.3d 1010 (2007), and in *Simonetta v. Viad Corp.,* 137 Wn. App. 15, 151 P.3d 1019 (2007), cannot be squared with Washington precedent or the weight of authority from other courts. Simply put, the Court of Appeals' observation in *Simonetta* that a duty to warn "has not traditionally applied to products manufactured by another," 137 Wn. App. at 25, is a monumental understatement. Until now, ***no*** Washington case has ever held that a manufacturer or supplier has a duty to warn about anything other than the characteristics inherent in its ***own*** product, and the overwhelming weight of case law nationwide rejects the imposition of a duty to warn about potential hazards presented solely by other manufacturers' products, no matter how foreseeable. Nonetheless, that is the duty the Court of Appeals imposed.

Moreover, the rule of law these opinions attempt to articulate rests on faulty assumptions, and will be impossible for trial courts to apply in a principled fashion in future cases.

Therefore, for the reasons already stated and for the reasons that follow, Crane Co. joins the other petitioners and *amici curiae* in requesting that this Court reverse the judgment of the Court of Appeals,

vacate its opinion, and reinstate the trial court's proper grants of summary judgment.

B. BACKGROUND

Plaintiff Vernon Braaten sued Crane Co. (and others), contending that defendants were liable for causing his mesothelioma, allegedly contracted as a result of jobsite exposures to asbestos while working as a pipefitter at Puget Sound Naval Shipyard. *See* CP 333, 517, 527-28.

The most significant aspect of the claims against Crane Co., for present purposes, is what they do ***not*** encompass. Specifically:

- ***There is no evidence that Crane Co. ever manufactured asbestos materials.*** *See, e.g.,* CP 1299. Crane Co. was a manufacturer of metal valves. *See id.*
- ***There is no evidence that Mr. Braaten was ever exposed to asbestos-containing components supplied by Crane Co.*** While some (but not all) Crane Co. valves included internal gaskets and packing, manufactured by others, which may have contained varying percentages of asbestos, *see id.,* there is no evidence Mr. Braaten was exposed to these components.

Instead, Plaintiff's claims against Crane Co. are based ***solely*** on alleged exposures to asbestos fibers released from others' products:

- ***External Insulation* Not Made or Supplied by Crane Co.:** While Mr. Braaten testified about removing and replacing insulation affixed to the exterior of valves. *See* CP 1323-24, 1335-36, 2036-40, there is no evidence that Crane Co. supplied any of these insulation materials.

- ***Flange Gaskets* Not Made or Supplied by Crane Co.:** Where a valve was connected to an adjoining pipe using a flanged joint, some type of gasket (manufactured and supplied by others) was used to prevent leakage from the joint. *See* CP 1299. This flange gasket may or may not have contained asbestos.[1] There is no evidence that Crane Co. supplied any flange gaskets to which Mr. Braaten may have been exposed.

- ***Replacement Parts* Not Made or Supplied by Crane Co.:** While Mr. Braaten testified about removing and replacing valve packing and gaskets in valves, including Crane Co. valves, *see* CP 369-73, 1323-24, 1335-36, 2036-40, the replacement materials were not made or supplied by Crane Co., *see* CP 5684, 5778. Nor could Mr. Braaten say whether any materials he removed from a Crane Co. valve were the ones originally supplied by Crane Co. *See*

[1] The flange gasket could have been made of a variety of other components. *See, e.g.,* CP 1278-79, 1283 (discussing Teflon, corrugated metal, and rubber gaskets).

CP 5684, 6391-92. Indeed, these components may not have even contained asbestos. *See* CP 1276-79, 1283, 6409-10, 6417-18.

This appeal thus does ***not*** involve (i) a defendant's duty to warn about characteristics of ***its own*** product, as that product left its control, even if it included components manufactured by others; or (ii) the extent of a defendant's duty to warn with respect to any other components (whether affixed to a product or used as replacement parts) that the defendant ***actually*** supplied. Under these circumstances, there is no support for a claim of liability against Crane Co. under Washington law.

C. ARGUMENT

1. Product Liability Law Properly Limits a Duty to Warn to Those Within a Product's "Chain of Distribution."

Until now, Washington precedents have always limited a product suppliers' duty to warn to its own products, either in isolation[2] or when used with other products in a fashion that synergistically creates a hazardous condition.[3] This is consistent with the overwhelming weight of

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[2] *See, e.g., Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 818 P.2d 1337 (1991); *Little v. PPG Indus., Inc.*, 92 Wn.2d 118, 594 P.2d 911 (1979); *Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 724 P.2d 389 (1986).

See also Stapleton v. Kawasaki Heavy Industries, Ltd., 608 F.2d 571 (5th Cir. 1979) (Kawasaki was liable for failing to warn of a characteristic of its own product: that its motorcycle would permit fuel leakage when its ignition was left in "on" position).

[3] *See, e.g., Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 570 P.2d 438 (1977), *superseded by statute as stated in, Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 704, 853 P.2d 408 (1993) (risk of breakage of defendant's "flowrater," when used with unsuitable

(footnote continued)

case law nationwide, which ***refuses*** to impose a duty to warn about hazards presented by others' products, no matter how foreseeable.[4]

Indeed, this Court's articulations of the scope of product liability have always, by their holdings and their terms, limited a product supplier's duties to its own products. For example, in *Haysom v. Coleman Lantern*

(footnote continued)
O-ring seals); *Bich v. General Elec. Co.,* 27 Wn. App. 25, 614 P.2d 1323 (1980) (risk of failure of defendant's transformer, if used with incompatible replacement fuses).

Cf. Tellez-Cordova v. *Campbell-Hausfeld/Scott Fetzger Co.,* 129 Cal. App. 4th 577, 28 Cal. Rptr. 3d 744 (2004) (defendants' grinding tools used with abrasive wheels or disks); *Wright* v. *Stang Mfg. Co.,* 54 Cal. App. 4th 1218, 63 Cal. Rptr. 2d 422 (1997) (fire truck "deck gun" used with inadequate and incompatible riser pipe).

[4] *See, e.g., Lindstrom v. A-C Prod. Liab. Trust,* 424 F.3d 488, 495-97 (6th Cir. 2005) (an asbestos defendant cannot be liable "for material 'attached or connected' to its product," or "for asbestos containing material that was incorporated into its product post-manufacture"); *Baughman v. General Motors Corp.,* 780 F.2d 1131, 1132-33 (4th Cir. 1986); *Cadlo* v. *Owens-Illinois, Inc.,* 125 Cal. App. 4th 513, 23 Cal Rptr. 3d 1, 9-10 (2004) (no duty to warn about asbestos made by another, where defendant "was not an integral part of the overall producing and marketing enterprise"); *Powell* v. *Standard Brands Paint Co.,* 166 Cal. App. 3d 357, 212 Cal. Rptr. 2d 395, 396-98 (1985) ("[N]o reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else," and "the manufacturer's duty is restricted to warnings based on the characteristics of *the manufacturer's own product*"); *Blackwell* v. *Phelps Dodge Corp.,* 157 Cal. App. 3d 372, 203 Cal. Rptr. 2d 706, 710 (1984); *Garman* v. *Magic Chef, Inc.,* 117 Cal. App. 3d 634, 173 Cal. Rptr. 20, 23 (1981) (product manufacturer is "not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product...in conjunction with another product...."); *Exxon Shipping Co. v. Pacific Res., Inc.,* 789 F. Supp. 1521, 1527 (D. Hawaii 1991); *Acoba v. General Tire, Inc.*, 92 Haw. 1, 986 P.2d 288, 305 (1999); *Newman v. General Motors Corp.,* 524 So. 2d 207, 209 (La. Ct. App. 1988); *Ford Motor Co. v. Wood,* 119 Md. App. 1, 703 A.2d 1315, 1329-30 (1998), *abrogated in part on other grounds by John Crane, Inc. v. Scribner,* 369 Md. 369, 800 A.2d 727 (2002); *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 487 N.E.2d 1374, 1376 (1986) ("We have never held a manufacturer liable... for failure to warn of risks created solely in the use or misuse of the product of another manufacturer."); *Brown v. Drake-Willock Int'l, Ltd.*, 209 Mich. App. 136, 530 N.W.2d 510, 515 (1995) ("The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else."); *Spencer v. Ford Motor Co.,* 141 Mich. App. 356, 367 N.W.2d 393, 396 (1985); *Rastelli v. Goodyear Tire & Rubber Co.,* 79 N.Y.2d 289, 591 N.E.2d 222, 225-26, 582 N.Y.S.2d 373, 376-77 (1992); *Toth v. Economy Forms,* 391 Pa. Super. 383, 571 A.2d 420, 423 (1989); *Walton v. Harnischfeger,* 796 S.W.2d 225, 227-28 (Tex. Ct. App. 1990); *Schreiner v. Wieser Concrete Prods., Inc.*, 294 Wis.2d 832, 720 N.W.2d 525, 530 (Wis. Ct. App. 2006).

Co., Inc., 89 Wn.2d 474, 573 P.2d 785 (1978), *superceded by statute, as stated in Van Hout v. Celotex Corp.,* 121 Wn.2d 697, 704, 853 P.2d 908 (1993), the Court stated that a manufacturer may "incur liability for failure to adequately warn of dangerous propensities of ***a product which it places in the stream of commerce***." 89 Wn.2d at 478-79 (emphasis added).[5]

This principle has its origin in *Seattle-First National Bank v. Tabert,* 86 Wn.2d 145, 542 P.2d 774 (1975), which took, as its starting point, the proposition that "[a] manufacturer is strictly liable in tort when an article he places on the market...proves to have a defect...." 86 Wn.2d at 147. It went on to extend liability to others "in the business of selling or distributing a product," *id.* at 148, and held that those "within the chain of distribution" were thus "within the scope of liability." *Id.* at 149.

The Court reemphasized the importance of a party's role in the "chain of distribution" as the basis for product liability in *Zamora v. Mobil Corp.,* 104 Wn.2d 199, 704 P.2d 584 (1985). There, the Court held that liability arises when the "seller has had ***some*** identifiable role in placing a defective product on the market." *Id.* at 207 (emphasis added).

The Court reiterated these principles in *Lockwood v. AC&S, Inc.,* 109 Wn.2d 235, 744 P.2d 605 (1987), an asbestos case, holding that a

[5] In *Haysom,* plaintiffs sued the manufacturer of a camp stove, for injuries resulting from an explosion of fuel, contending that it owed a duty to warn about the risks presented in use of the stove. Tellingly, the Court never suggested that the stove manufacturer owed any duty to warn about the hazardous characteristics of the fuel itself.

plaintiff generally "must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product." 109 Wn.2d at 245 (citing *Martin v. Abbott Laboratories,* 102 Wn.2d 581, 590, 689 P.2d 368 (1984)). Accordingly, the Court restated the general rule that "a manufacturer has a duty to warn consumers of the dangerous propensities of ***its product*** of which it has knowledge...." 109 Wn.2d at 259 (emphasis added).[6]

These decisions are consistent with broader principles of product liability law, as reflected in decisions from other states. For example, in *Peterson v. Superior Court,* 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995),[7] the California Supreme Court observed that product liability law "provides generally that manufacturers, retailers, and ***others in the marketing chain of a product*** are strictly liable in tort for personal injuries caused by a defective product." The Court thus declined to

[6] Even when this Court has relaxed the "chain of distribution" requirement in unique circumstances, it has stressed its general importance as a prerequisite for product liability. For example, *Martin v. Abbott Laboratories,* in imposing a modified "market share" liability system for DES claims, recognized "the familiar principle that a tortfeasor may be held liable only for damage that it has caused," 102 Wn.2d at 603, and thus carefully preserved defendants right to show that a plaintiffs' injuries resulted from someone else's product. *Id.* at 605. In effect, the Court in *Martin* did not abandon the "chain of distribution" requirement, but merely shifted the burden to defendant to prove that it could not have been a link in that chain.

[7] Because the California Supreme Court has been an innovator in the law of product liability, this Court has often looked to it for guidance. *See, e.g., Martin,* 102 Wn.2d at 613-17 (adopting *Ray v. Alad Corp.,* 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977)); *Seattle-First v. Tabert,* 86 Wn.2d at 147 (relying on *Greenman v. Yuba Power Prods., Inc.,* 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963)).

impose strict liability on entities (there, landlords and innkeepers) that were "not a part of the manufacturing or marketing enterprise of the allegedly defective product that caused the injury in question," holding that "it would be improper to impose strict liability under products liability principles upon a [defendant] for injuries caused by an alleged defect...that the [defendant] did not create or market." 899 P.2d at 906, 43 Cal. Rptr. 2d at 837 (emphasis added).

In so holding, *Peterson* relied heavily on the policies underlying California's product liability law, which seek to ensure that "responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market," *Escola* v. *Coca Cola Bottling Co.,* 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring): (i) the manufacturer who "can anticipate some hazards and guard against the recurrence of others," 150 P.2d at 440-41, and (ii) others who "may be in a position to exert pressure on the manufacturer to that end," *Vandermark v. Ford Motor Co.,* 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964).

Peterson recognized that imposing liability upon defendants which are outside the product's chain of distribution does not effectively further these policies. When a defendant has "no continuing relationship with the chain of marketing leading back to the manufacturer of the defective

product," it "has no way of influencing the production or design of the product or of adjusting potential costs." 899 P.2d at 908, 43 Cal. Rptr. 2d at 840 (internal quotation omitted). In other words, a defendant outside the chain of distribution "cannot exert pressure upon the manufacturer to make the product safe and cannot share with the manufacturer the costs of insuring... safety." 899 P.2d at 913, 43 Cal. Rptr. 2d at 844.

These underlying policies are also the policies of Washington. The basic rationale motivating strict liability under Section 402A, and hence Washington law, is "that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production...." *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 792-93, 106 P.3d 808 (2005) (quoting RESTATEMENT (SECOND) OF TORTS § 402A, comm. c (1965)). Extending product liability to those who had no involvement in manufacturing or distributing a product does not serve these ends, and thus is a step that this Court should not take.

a. Crane Co. Cannot Be Liable for External Insulation or Flange Gaskets That It Did Not Manufacture or Supply.

Applying these principles, Crane Co. is not liable for external insulation or flange gaskets, because there is nothing to suggest that Crane

Co. was within the "chain of distribution" of the insulation or flange gaskets to which Mr. Braaten was allegedly exposed.

Indeed, Crane Co.'s valves, adjoining flange gaskets, and any affixed insulation are ***all*** properly considered to be merely individual components ***incorporated by the Navy*** into its vessels' piping systems. So viewed, a holding requiring Crane Co. to warn about the hazards of those other components is unwarranted. In such a situation, the correct rule of decision was articulated in *Sepulveda-Esquivel v. Central Machine Works, Inc.,* 120 Wn. App. 12, 19, 84 P.3d 895 (2004): "Under the common law, component sellers are not liable when the component itself is not defective."[8] *Accord* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998), § 5, comm. a ("As a general rule, component sellers should not be liable when the component itself is not defective....").

The rationale for such a rule is intuitive and persuasive:

> Making suppliers of inherently safe raw materials and component parts pay for the mistakes of the finished product manufacturer would not only be unfair, but it also would impose an intolerable burden on the business world.... ***Suppliers of versatile materials like*** *chains,* ***valves,*** sand, gravel, etc., ***cannot be expected to become experts in the infinite number of finished products that***

[8] In *Sepulveda-Esquivel*, the plaintiff was injured due to the failure of a crane hook assembly, which was caused by the failure of a "mouse" used on the open end of the hook. Because the "mouse" failed, and not the hook itself, the Court held that the hook manufacturer bore no liability. While *Sepulveda-Esquivel* involved the Washington Products Liability Act and not common law principles, its holding is in accord with both.

> ***might conceivably incorporate their multi-use raw materials or components.***

In re TMJ Implants Prod. Liab. Litig., 97 F.3d 1050, 1057 (8th Cir. 1996) (emphasis added).[9] The same rationale applies here: Crane Co. cannot reasonably be held to be an expert in the many ways in which insulation might be used in naval applications, or the many types of gasket materials that might be used to seal joints between its valves and related piping. *See, e.g.*, CP 1278-79, 1283. Because the Navy, not Crane Co., was the ultimate decision-maker, it (along with the manufacturer of the affixed parts) was in the best position to provide any needed warnings, and Crane Co. should not be held liable for the Navy's actions or others' products.

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[9] Another persuasive explication of this principle is *In re Deep Vein Thrombosis,* 356 F. Supp. 2d 1055, 1068-69 (N.D. Cal. 2005), which rejected "the proposition that a manufacturer, after its product is sold to a purchaser, is under a duty to warn a third party (with whom the manufacturer has never had contact) that the purchaser may or may not have supplemented the manufacturer's completed product with an allegedly defective piece of equipment." This "convoluted theory of liability," in the court's view:

> stretches a manufacturer's tort liability too far. Under plaintiffs' theory, Boeing would be a under a duty, after selling a completed aircraft to Delta, to inspect and discover (1) what seat manufacturer Delta chose and (2) whether the seats actually installed are somehow defective. If Boeing decides that Delta purchased potentially defective seats, Boeing would be under a duty to include warning placards in the aircraft's cabin – cabin that is no longer Boeing's property – warning passengers that Boeing believes the seats on the plane are defectively designed or configured in a way that increases DVT risks and that passengers should ambulate during the flight and stay well hydrated.... There is no support for imposing such a duty on Boeing as aircraft manufacturer.

Accord RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998), § 5, comm. a ("Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.").

b. Crane Co. Should Not Be Liable for Replacement Parts That It Did Not Manufacture or Supply.

The "chain of distribution" requirement also militates against imposing liability upon Crane Co. for replacement parts, installed in Crane Co. valves after they left Crane Co.'s possession, which were neither manufactured nor supplied by Crane Co. The rationales that underlie the "chain of distribution" prerequisite for product liability support a continued adherence to that rule even in the context of replacement parts.

Perhaps the most persuasive articulation of these rules in the context of replacement parts is the Fourth Circuit's decision in *Baughman v. General Motors,* 780 F.2d 1131 (4th Cir. 1985). There, the plaintiff was injured when a replacement wheel exploded after tire replacement and reinflation. *Id.* at 1132. Plaintiff argued that GM was liable for failing to warn that the wheel could explode after the tire was inflated, because the replacement wheel was similar in type to the wheel originally supplied by GM. The Court of Appeals, affirming a summary judgment for GM, disagreed:

> Where, as here, the defendant manufacturer did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had an opportunity to test, evaluate, and inspect the component; it

> has derived no benefit from its sale; and it has not represented to the public that the component part is its own.

Id. at 1132-1133. Indeed, a contrary rule, observed the Court:

> would require a manufacturer to test all possible replacement parts made by any manufacturer to determine their safety and to warn against the use of certain replacement parts. If the law were to impose such a duty, the burden upon a manufacturer would be excessive.... [A] manufacturer...cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers. The duty to warn must properly fall upon the manufacturer of the replacement component part.

Id. at 1133.

The same rationale applies here: whatever type of internal gasket or valve stem packing may have been originally installed into a valve by Crane Co., there were a wide variety of potential replacement parts that the Navy could have utilized, including Teflon, corrugated metal, rubber, etc. *See, e.g.,* CP 1278-79, 1283; CP 6409-10 ("there were more than 60 types of packing approved for naval service use"), CP 6417-18. And even if the replacement parts contained asbestos, the nature of any associated risk is not necessarily the same, because "[a]sbestos products exist in a wide variety of forms, which differ in the amounts and percentages of asbestos they contain. In addition, the tendency of such products to

release asbestos fibers into the air depends on their form and on the methods in which they are handled." *Lockwood,* 109 Wn.2d at 248.[10]

In consequence, any duty to warn about the hazardous characteristics of replacement parts is ***not*** appropriately imposed upon the ***original*** manufacturer, who lacks the ability to control the type and nature of replacement parts. Rather, such a duty is properly laid at the feet of the manufacturer of the replacement part (here, the manufacturers identified in Mr. Braaten's testimony, *see* CP 5778), and with the entity who made the decision to utilize the specific replacement parts (here, the Navy).[11]

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[10] *Rutherford v. Owens-Illinois, Inc.,* 16 Cal. 4th 953, 941 P.2d 1203, 1216, 67 Cal. Rptr. 2d 16, 29 (1997) ("Asbestos products... have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others. This divergence is caused by a combination of factors, including: the specific type of asbestos fiber incorporated into the product; the physical properties of the product itself; the percentage of asbestos used in the product. There are six different asbestos silicates used in industrial applications and each presents a distinct degree of toxicity in accordance with the shape and the aerodynamics of the individual fibers." (citations and internal quotations omitted)).

[11] As an aside, the Court of Appeals' opinion by its terms suggests that its rationale is limited to replacement parts, and not affixed parts such as external insulation or flange gaskets, stating that a duty to warn exists "when a product's ***design*** utilizes a hazardous substance, and there is a danger of that substance being released ***from*** the product during normal use...." 137 Wn. App. at 46 (emphasis added). *Accord id.* at 44-45. Therefore, even if this Court were to accept the Court of Appeals' formulation of Washington law, this Court should still reverse insofar as the Court of Appeals sought to hold Crane Co. liable for external or affixed components, such as insulation or flange gaskets: these components were not "utilized" in the "design" of Crane Co. valves, and did not lead to any asbestos "being released from" the Crane Co. valve.

c. The Requirement that a Manufacturer Warn of Hazards Attendant to the "Use" of Its Products Does Not Require Warnings of Hazards Associated with Other Products.

In the absence of direct precedential support for an expansion of liability, Plaintiff argued that the imposition of a duty to warn with respect to others' products was simply a corollary to the principle that "a product ... may be considered unreasonably unsafe if it is placed in the hands of the ultimate consumer unaccompanied by adequate warning of dangers necessarily involved in its use." *Terhune v. A.H. Robins Co.,* 90 Wn.2d 9, 12, 577 P.2d 975 (1978); *Haysom,* 89 Wn.2d at 479; *Teagle,* 89 Wn.2d at 155. Because the arguably foreseeable "use" of Crane Co. valves involved potential exposure to external insulation, flange gaskets and replacement parts, Plaintiff argued, Crane Co. was obligated to warn about any hazards associated with those products. The Court of Appeals accepted this characterization uncritically. *See Braaten,* 137 Wn. App. at 42, 49.

The California Court of Appeal correctly called the same argument "semantic nonsense." *Garman* v. *Magic Chef, Inc.,* 117 Cal. App. 3d 634, 173 Cal. Rptr. 20, 22 (1981). At bottom, it ultimately begs the essential question of what the "use" of a product is, and where the line is drawn between aspects of a product's "use" that justify a duty to warn and those

that do not. After all, the "use" of Crane Co. valves also requires pipe wrenches, which pose a number of foreseeable injury risks (fingers caught in wrench jaws, a dropped wrench that hits one's foot, etc.). More distantly, the "use" of Crane Co. valves may require a worker to come in contact with hot piping (risking burns or heat exhaustion), may require a worker to scale ladders (risking a fall), and may expose the worker to hazardous substances carried by the relevant piping system. Nonetheless, the Court of Appeals' ruling provides no principled distinction as to where there is a duty to warn and where there is not.

That boundary can only be drawn using "mixed considerations of logic, common sense, justice, policy and precedent," as this Court directs. *Snyder v. Medical Serv. Corp. of E. Wash.,* 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). While foreseeability is an element of this inquiry, it is not the sole one – in the words of the California Supreme Court, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Thing v. La Chusa,* 48 Cal. 3d 644, 669, 771 P.2d 814, 830, 257 Cal. Rptr. 865, 881 (1989). Less poetically, "[f]oreseeability limits the scope of a duty," and "does not independently create a duty." *Halleran v. Nu West, Inc.,* 123 Wn. App. 701, 717, 98 P.3d 52 (2004).

Balancing all relevant considerations, the only reasonable conclusion, consistent with Washington law and policy, as shown above, is that the duty to warn is limited to the characteristics of one's own product, or (conversely) that only those within the chain of distribution or who have ultimate control over a final product are obligated to warn users of any dangerous characteristics that may attend the use of that product.

2. The Court of Appeals' Imposition of a Duty to Warn of the Hazards Associated with Others' Products Rests on Inaccurate Assumptions.

The Court of Appeals' opinion is not only unsupportable in law, but appears to rest upon a number of inaccurate policy assumptions.

First, the Court justified its expansion of liability to those outside the chain of distribution in part to ensure that consumers obtain "the maximum of protection at the hands of someone" for injuries associated with asbestos, *see Braaten,* 137 Wn. App. at 46, simply because "the manufacturers… are, for the most part, no longer amenable to judgment." *Id.* at 45. This assumption is half-true at most. While most asbestos manufacturers have gone through bankruptcy proceedings, that does ***not*** mean that injured claimants are left without recourse. In fact, bankruptcy trusts set up for claimant compensation "have at least $35 billion in assets and potentially as much as $60 billion," and "the face value of a mesothelioma claim" like Mr. Braaten's "across all the trusts is about $7

million." Charles E. Bates & Charles E. Mullin, *Having Your Tort and Eating It Too?,* 6 MEALEY'S ASBESTOS BANKRUPTCY REPORT, No. 4, reprint at 2, 4 (Nov. 2006) (available at www.bateswhite.com/news/pdf/Having_Your_Tort.pdf). As a result, one commentary has observed that now, "[f]or the first time ever, trust recoveries may fully compensate asbestos claimants." *Id.* at 1. Accordingly, even if the mere search for a solvent defendant were to justify an expansion of liability,[12] no such expansion is needed here.

Second, the Court of Appeals also implicitly assumed that expanding a manufacturer's duty to warn, to include potential hazards associated with products used with the manufacturer's products, would promote safety. That assumption is also incorrect, or at least questionable, and the opposite may well happen, as the California Supreme Court warns:

> If we overuse warnings, we invite mass consumer disregard and ultimate contempt for the warning process. Moreover, both common sense and experience suggest that if every report of a possible risk, no matter how speculative, conjectural, or tentative, imposed an affirmative duty to give some warning, a manufacturer would be required to inundate...indiscriminately with notice of any and every hint of danger, thereby inevitably diluting the force of any specific warning given.

[12] It does not – this Court has made it clear that "we do not premise liability on manufacturers solely because of their ability to pay tort judgments." *George v. Parke-Davis,* 107 Wn.2d 584, 590, 733 P.2d 507 (1987).

Finn v. G.D. Searle & Co., 35 Cal. 3d 691, 677 P.2d 1147, 1153, 200 Cal. Rptr. 870, 876 (1984) (internal quotation omitted).[13]

That concern is hardly speculative: the engine room of a naval vessel has thousands of valves, pumps, turbines and other components and miles of piping, much of which is insulated. If each of these components required its own set of warnings – not only of their own potential hazards, but also of the potential hazards presented by associated components – the average seaman would be overwhelmed with placards, labels, densely-printed nameplates and instruction manuals. The expansion of a duty to warn, in such a case, may well be counterproductive.

3. At a Minimum, the Court of Appeals' Decision Should Be Vacated as an Unnecessary "Advisory Opinion," Because of the Preclusive Effect of Prior Judgments.

Finally, the Court of Appeals' decision contravenes principles of judicial restraint. Here, the application of collateral estoppel would have obviated the need for the Court of Appeals to have decided an "issue of first impression," *Braaten,* 137 Wn. App. at 42. The record is clear that Mr. Braaten litigated and lost the identical issue – a manufacturers'

[13] *See also Carlin v. Superior Court,* 13 Cal. 4th 1104, 920 P.2d 1347, 1360, 56 Cal. Rptr. 2d 162, 175 (1996) (Kennard, J., concurring and dissenting) (observing that an overly-broad duty to warn may result in "the destruction of the viability of any warnings.... Too broad a standard may prove ineffective and even counterproductive.... Not only would such remote risk warnings crowd out potentially useful warnings but they would also focus consumer attention on the fairy tale bogeyman. One cannot cry wolf without paying the price over the long term." (internal quotation omitted)).

liability for affixed and replacement parts – in his Brazoria County, Texas lawsuit. *See* CP 375-83, 385. As the Court of Appeals properly concluded, this precludes Mr. Braaten from asserting similar claims here. 137 Wn. App. at 40. That holding is final, it is law of the case, and it will compel entry of judgment below against ***any*** party whose "products were to be installed on Navy ships and used with asbestos," *id.,* including Crane Co. For this reason alone, the Court of Appeals should be reversed.

D. CONCLUSION

Crane Co. respectfully requests that this Court reverse the Court of Appeals, vacate the Court of Appeals' opinion and reinstate the Superior Court's judgment in Crane Co.'s favor.

Respectfully submitted this 8th day of February, 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the

SUPPLEMENTAL BRIEF OF PETITIONER CRANE CO.

were delivered via First Class, Postage Pre-Paid, U.S. Mail to the parties listed below.

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Dated this 8th day of February, 2008.

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